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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

JAN 16 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	
)	
Promotion of Competitive Networks in)	
Local Telecommunications Markets)	WT Docket No. 99-217
)	
Wireless Communications Association)	
International, Inc. Petition for Rulemaking to)	
Amend Section 1.4000 of the Commission's Rules)	
to Preempt Restrictions on Subscriber Premises)	
Reception or Transmission Antennas Designed To)	
Provide Fixed Wireless Services)	
)	
Cellular Telecommunications Industry)	
Association Petition for Rule Making and)	
Amendment of the Commission's Rules)	
to Preempt State and Local Imposition of)	
Discriminatory And/Or Excessive Taxes)	
and Assessments)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	

**OPPOSITION OF THE SMART BUILDINGS POLICY PROJECT
TO THE REAL ACCESS ALLIANCE MOTION FOR STAY**

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Pursuant to Section 1.45(d) of the Commission's rules,¹ the Smart Buildings Policy Project ("SBPP")² hereby submits its Opposition to the Real Access Alliance Motion for Stay filed in the above-captioned proceeding.³

¹ 47 C.F.R. §1.45(d).

² The Smart Buildings Policy Project is a coalition of telecommunications carriers, equipment manufacturers, and organizations that support nondiscriminatory telecommunications carrier access to tenants in multi-tenant environments. The SBPP presently includes Alcatel USA, American Electronics Association, Association for Local Telecommunications Services, AT&T, Comcast Business Communications, Commercial Internet eXchange Association, Competition Policy Institute, Competitive

I. INTRODUCTION

The Real Access Alliance ("RAA") filed with the Commission a Motion to stay the effectiveness of its *Competitive Networks First R&O*, and the new regulations implementing it, that extends the Over-the-Air Reception Devices ("OTARD") preemption to include customer-end antennas used for transmitting or receiving fixed wireless signals. The Motion for Stay fails to provide a legally sufficient basis to warrant the relief it requests. Consequently, the Commission should deny the motion.

II. THE MOTION FOR STAY IS PREMATURE.

The RAA claims that a stay of the relevant rules is "urgently required,"⁴ a quixotic allegation given the RAA's immediately subsequent statement that "Federal Register publication triggering an effective date of 60 days thereafter for the new Section 1.4000 has not yet occurred. Thus, implementation of the revised OTARD rule remains months away *and no harm has*

Telecommunications Association, Digital Microwave Corporation, Focal Communications Corporation, The Harris Corporation, Highspeed.com, Information Technology Association of America, Lucent Technologies, NetVoice Technologies, Inc., Network Telephone Corporation, Nokia Inc., International Communications Association, P-Com, Inc., Siemens, Telecommunications Industry Association, Teligent, Time Warner Telecom, Winstar Communications, Inc., Wireless Communications Association International, WorldCom, and XO Communications, Inc. The SBPP website can be viewed at <www.buildingconnections.org>.

³ Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *Motion for Stay of the Real Access Alliance* (filed Jan. 8, 2001)("Motion for Stay").

⁴ *Motion for Stay* at 2.

occurred from any delay in filing this stay motion.”⁵ As the RAA Motion for Stay itself suggests, the request for Commission action is premature.

According to the *Competitive Networks First R&O*, the rule for which the Real Access Alliance (“RAA”) seeks a stay does not become effective until 60 days following publication of the Order in the Federal Register.⁶ The *Competitive Networks First R&O* was published in the Federal Register on January 11, 2001, three days after the Real Access Alliance (“RAA”) filed its Motion for Stay.⁷ The provisions at issue will not become effective until March 12, 2001. Given that the rules at issue remain ineffective and that Petitions for Reconsideration of the *Competitive Networks First R&O* must be filed before the effective date of those rules,⁸ the RAA’s concerns are more appropriately addressed through a Petition for Reconsideration. The Commission should not expend resources considering the merits of an RAA Motion for Stay unless and until, at a minimum, the Commission declines to act on an RAA Petition for Reconsideration in a manner that is legally satisfactory to the RAA before the rules at issue become effective.

⁵ Id. at n.3 (emphasis added)(citation omitted).

⁶ Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, FCC 00-366 at ¶ 187 (rel. Oct. 25, 2000)(“*Competitive Networks First R&O*”).

⁷ 66 Fed. Reg. 2322.

⁸ Petitions for Reconsideration of the *Competitive Networks First R&O* are due on or before February 12, 2001. 47 C.F.R. §1.429(d).

III. THE MOTION FAILS TO SHOW THAT THE REAL ACCESS ALLIANCE WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY.

The RAA also fails to demonstrate that it will be irreparably harmed without a stay of the effectiveness of the Commission's rules. Indeed, the harm that it addresses is rather unclear from the Motion. On one hand, the Motion refers vaguely to the "human health and safety hazard" presented by fixed wireless transceivers.⁹ This "hazard" -- to the extent that the RAA implies that "death or serious injury to a tenant or a tenant's guest or a building injury"¹⁰ could occur -- is vastly overstated. It bears mention that many members of the Commission staff along with carrier representatives have toured MTE rooftop facilities in close proximity to fixed wireless antennas without injury. Nevertheless, as the Motion concedes, the *Competitive Networks First R&O* emphasizes that "all FCC-regulated transmitters, including the subscriber terminals used in fixed wireless systems, are required to meet the applicable Commission guidelines regarding radiofrequency exposure limits."¹¹

The RAA erroneously asserts that thresholds of presumed RF radiation harm are not specified for the fixed wireless services at issue here.¹² To the contrary, the Commission's OET Bulletin Number 65 defines maximum RF exposure limits that apply to *all* antennas operating at greater than the specified power levels.¹³ All transmitting facilities and devices licensed by the Commission or authorized pursuant to a Commission order (which includes any antenna covered

⁹ *Motion for Stay* at 5.

¹⁰ *Motion for Stay* at 6.

¹¹ *Competitive Networks First R&O* at ¶ 117.

¹² *Motion for Stay* at 6, n.6.

¹³ See "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields," OET Bulletin 65, Edition 97-01, Office of Engineering and Technology, Federal Communications Commission at 12.

by the OTARD extension for which the RAA seeks this Stay) -- even those categorically excluded from routine RF evaluations -- are subject to compliance with these maximum RF exposure limits.¹⁴ Hence, the Commission properly relies upon compliance with its guidelines concerning RF exposure limits to avoid human health and safety hazards. To the extent that the RAA doubts the efficacy of these guidelines, its Motion calls into question the entirety of the Commission's rules concerning RF exposure limits. Such concerns are neither properly nor adequately considered in the narrow context of a Motion for Stay of rules adopted in the *Competitive Networks* rulemaking.

The Motion also alludes to costs that building owners may bear as a potential "irreparable injury." The irreparable harm to which the Motion refers by necessity of the operating standard, is neither certain nor irreparable. The RAA "imagine[s]" "hazard expenses" that may have to be borne by building owners and that "cannot be recovered except through rent increases or other assessments against carriers."¹⁵ A mere imagined possibility of harm cannot be sufficient to stay the Commission's rules.¹⁶ Moreover, as the Motion itself concedes, were

¹⁴ *Id.* ("It is important to emphasize that the categorical exclusions are **not** exclusions from **compliance** but, rather, exclusions from performing routine evaluations to demonstrate compliance.")(emphasis in original). Moreover, "the Commission still retains the authority to request that a licensee . . . conduct an environmental evaluation and, if appropriate, file environmental information pertaining to an otherwise categorically excluded RF source if it is determined that there is a possibility for significant environmental impact due to RF exposure." *Id.* (citation omitted).

¹⁵ *Motion for Stay* at 6.

¹⁶ See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)(" Although the concept of irreparable harm does not readily lend itself to definition, the courts have developed several well known and indisputable principles to guide them in the determination of whether this requirement has been met. First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.'")(citing *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

such a remote possibility to occur, building owners can seek reparations from the carriers that caused the harm. As the D.C. Circuit explained:

Mere injuries, however substantial, in terms of money . . . necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.¹⁷

Given that the RAA makes no acceptable showing of irreparable injury, the Commission should deny the Motion for Stay.

IV. PUBLIC INTEREST CONSIDERATIONS SUPPORT A DENIAL OF THE MOTION FOR STAY.

Such a conclusion is further supported by the absence of any public interest benefits in granting the Motion for Stay. Indeed, public interest considerations counsel denial of the RAA's Motion. The Commission concluded that its OTARD extension would "facilitate efficient deployment of competitive communications services"¹⁸ and that its previously bifurcated approach to implementation of Section 207 "potentially distort markets by creating incentives to include video programming service in many service offerings even if it is not efficient or desired by the consumer."¹⁹ It also determined that "the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals will foster the deployment of advanced telecommunications services" consistent with the stated goals of the Telecommunications Act of 1996.²⁰ Finally, the Commission concluded that if it failed to adopt the OTARD extension rules, the Commission "would effectively undermine the policies against

¹⁷ Virginia Petroleum Job. Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

¹⁸ *Competitive Networks First R&O* at ¶ 102.

¹⁹ *Id.* at ¶ 98.

²⁰ *Id.* at ¶ 103.

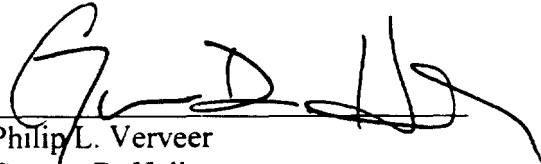
unreasonable charges and discriminatory policies” that are codified in the Communications Act.²¹ A stay of the rules as requested by the RAA’s motion would suspend or eliminate these public interest benefits and obligations in derogation of the Commission’s statutorily defined responsibilities.

V. CONCLUSION

For the foregoing reasons, the Smart Buildings Policy Project opposes the Real Access Alliance’s Motion for Stay and respectfully urges its denial by the Commission.

Respectfully submitted,

SMART BUILDINGS POLICY PROJECT

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Dated: January 16, 2001

²¹ Id. at ¶ 104.

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 16th day of January, 2001 copies of the Opposition Of The Smart Buildings Policy Project To The Real Access Alliance Motion For Stay were delivered by postage pre-paid first class mail to the following parties:

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